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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1355

JOHN V. WADEMAN,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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STATE OF NEW JERSEY,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Petitioner John V. Wademan prays that a writ of certiorari issue to review the Judgment of the Superior Court of New Jersey, Appellate Division, entered in the above-entitled case on December 4, 1969.

Opinion Below

The opinion of the Superior Court of New Jersey, Appellate Division, is unreported. Certification was denied by the Supreme Court of New Jersey on February 10, 1970. The Order denying certification is also, as yet, unreported.

Jurisdiction

The Judgment of the Superior Court of New Jersey, Appellate Division, was entered on December 4, 1969. The Judgment and Opinion of the Appellate Division is attached hereto at p. 1a. Further review of this case, by way of a petition for certification, was denied by the Supreme Court of New Jersey on February 10, 1970. Petitioner invokes the jurisdiction of this Court under 28 U. S. C. §1257 pursuant to the requirements of 28 U. S. C. §1257 and Rule 23 (1) (f) of this Court, the federal questions presented herein were timely and properly raised below, as shown by the following passages from the opinion below of the Superior Court of New Jersey, Appellate Division:

> "Finally we find no substance in defendant's criticism of the court's comments on the testimony nor in his argument that *N.J.S.A.* 2A:81-12 is unconstitutional. Our cases have uniformly held the cited statute constitutional. . . ."

Question Presented

Whether N.J.S.A. 2A:81-12, which permits admissibility of prior record conviction evidence of any crime for the purpose of impeaching the credibility of a defendant witness violates the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

Constitutional Provision Involved

UNITED STATES CONSTITUTION—Fifth Amendment.

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the

Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

UNITED STATES CONSTITUTION—Sixth Amendment.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

UNITED STATES CONSTITUTION—Fourteenth Amendment.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws."

Statute Involved

N.J.S. 2A:81-12—Interest or conviction of crime as affecting credibility:

> "For the purpose of affecting the credibility of any witness, his interest in the result of the action, proceeding or matter or his conviction of any crime may be shown by examination or otherwise, and his answers may be contradicted by other evidence. Conviction of crime may be proved by the production of the record thereof, but no conviction of an offender shall be received in evidence against him in a civil action to prove the truth of the facts upon which the conviction was based."

Statement of the Case

John V. Wademan and William R. Mack were tried on five counts of a six-count indictment returned by the Morris County Grand Jury. The five counts brought to trial were: robbery of sixteen diamond rings from one Albert Tessler (N.J.S. 2A:141-1); unlawful entry with intent to rob (N.J.S. 2A:94-1); assault with a dangerous weapon upon one Max Hirschhorn (N.J.S. 2A:90-3); assault with a dangerous weapon upon one James Sterns (N.J.S. 2A:90-3); and larceny of Max Hirschhorn's 1963 Continental automobile (N.J.S. 2A:119-2) (D1a-1 to D2a-25).* The third count of the indictment was severed for the purposes of trial, and was eventually dismissed on motion of the State (D1363a-20 to D1364a-5).

After the close of the State's case, the trial court granted Mack's motion for a judgment of acquittal as to all counts (D1066a-2 to D1068a-10).

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*The transcript references herein are taken from the transcript volumes which constituted the record on appeal before the Superior Court of New Jersey, Appellate Division.

Wademan was found guilty of all five counts (D1326a-21 to D1327a-7). He was sentenced to a three-to-five year term in New Jersey State Prison on the first count of the indictment; a concurrent three-to-five year term on the second count; a one-to-two year term on the fourth count, consecutive to the first count; and a one-to-two year term on the fifth and sixth counts, concurrent with the fourth count (D1355a-15 to D1356a-10; D1365a to D1366a). The Superior Court of New Jersey, Appellate Division, affirmed the conviction (p. 5a). Certification was denied by the New Jersey Supreme Court (p. 6a).

On the morning of Friday, August 19, 1966, two men entered the jewelry store of one Albert Tessler, located at 49 Broadway, Denville, New Jersey (D5a-6 to D9a-9). According to Tessler, one of the men had been to the jewelry store just two days previously, on August 17, 1966 (D9a-12 to 25). Tessler placed a tray of rings on the counter, with both men opposite him, and turned around to get another tray (D11a-5 to 11). When he looked back he saw the man who had previously been in his store still standing at the counter with both hands raised (D11a-14 to 18). Tessler felt somebody grab him, and he threw himself on the floor (D11a-21 to D12a-3). While on the floor, he heard a shot (D12a-5).

When Tessler got up from the floor he ran to the door and started to yell (D13a-70). He noticed that the tray of rings was gone from the counter (D12a-20 to 24). Tessler observed the two men running east on Broadway, but lost sight of the two men when they disappeared behind the easterly side of the Fireside Tavern, two doors down from his store (D13a-11 to D14a-5; D17a-5 to 16).

The chase was continued by three young men, James Souvay (then known as James Sterns), Ronald Thorsen, and Robert Sommerville. Near the top of a steep embankment leading onto U. S. Highway No. 46, one of the two men turned and fired a shot in Souvay's general direction, temporarily slowing down their pursuers (D352a-1 to D356a-6; D450a-1 to D452a-6; D567a-5 to D571a-10).

Once onto the highway, the two men flagged down Max Hirschhorn, a passing motorist (D367a-7 to D368a-3). One man got into the front of Hirschhorn's car and pointed a pistol at him, and the other man sat in the back (D368a-6 to D369a-3). The man with the gun instructed Hirschhorn to drive fast, and eventually he took the wheel over from Hirschhorn, operating the automobile from the passenger's side (D369a-7 to 18). The car was driven further westerly to the rear of a department store known as Rockaway Sales, where Hirschhorn was told to remove himself from the automobile (D370a-4 to 19). After Hirschhorn departed, the two men then drove off in his automobile (D370a-20 to 25). Later that day, Hirschhorn's vehicle was found, parked on the street, in Dover, New Jersey (D665a-16 to D666a-5; D667a-19 to 22).

Eyewitness identification—in great conflict—emerged as a critical issue in the trial of this case. Tessler claimed that Wademan was one of the two men who had been in his store on the morning of the incident, as well as two days previously (D141a-22 to D142a-15). Souvay (Sterns) identified Wademan as one of the men he had chased (D441a-12 to 22). His companion, Sommerville, was unable to identify either defendant as having been at the scene (D586a-9 to 15). The testimony of the third young man, Thorsen, was stricken from the record (D365a-2 to 20).

Hirschhorn was unable to make any in-court identification of the men who had commandeered his car (D373a-21 to D374a-13).

Conflicting expert testimony was also introduced by both the State and the defense about a palm print found on a glass counter in Tessler's jewelry store, the State claiming that the print was made by Wademan (D924a-1 to D1008a-16; D1109a-19 to D1202a-6; D1242a-12 to D1256a-17).

Jacob Silverman and Frank Serito, two witnesses, testified that Wademan was a considerable distance from Denville at the time of the incidents set forth in the indictment (D1100a-3 to D1109a-17; D1216a-17 to D1237a-4). The defense also offered proof that Wademan's automobile—found in Denville—had been reported to the Harrison, New Jersey Police Department (Wademan's home town), as having been stolen (D1237a-15 to D1240a-16).

Wademan did not take the stand to testify in his own behalf, having elected not to expose his prior criminal record to the jury.

REASONS FOR GRANTING THE WRIT

I

This Court should grant certiorari to determine whether N.J.S. 2A:81-12 permitting proof of conviction of a crime for the purpose of affecting credibility, deprives a defendant with a prior criminal record of fundamental constitutional rights.

John Wademan did not take the stand to testify in his own behalf. His decision not to testify was generated by the terrible dilemma which confronts any defendant with a prior criminal record: the impossible burden imposed by N.J.S. 2A:81-12.

The statute permits proof of conviction of any crime for the purpose of "affecting credibility." Such a statute presented defendant with simple—and dreadful—alternatives: take the stand and expose a previous criminal record to the jury; or choose not to testify and create an irresistibly adverse influence of guilt by not directly answering the State's damning charges. The effect of N.J.S. 2A:81-12 is the denial to a defendant with a criminal record of due process of law under the Fourteenth Amendment of the United States Constitution, and a denial to his constitutional right of impartial trial by jury under the Sixth Amendment.

The State from which this case emanates has already rejected this contention. *State* v. *Brown,* 41 N. J. 590, 198 A. 2d 441 (Sup. Ct. 1964), *cert. denied,* 377 U. S. 981 (1964); *State* v. *Garvin,* 44 N. J. 268, 208 A. 2d 442 (Sup. Ct. 1965); see, also, *State* v. *Johnson,* 90 N. J. Super. 105, 215 A. 2d 397 (App. Div. 1965), *affirmed,* 46 N. J. 289, 216 A. 2d 392 (Supreme Ct. 1966). So, too,

have similar attacks upon similar statutes failed in other jurisdictions. See, *e.g.*, *Dotson* v. *Boles*, 271 F. Supp. 24 (N. D. W. Va. 1967), upholding the constitutionality of West Virginia statute similar to the New Jersey law here under attack.

But the massive potential for injustice created by N.J.S. 2A:81-12—and by similar laws in other jurisdictions—mandates a fresh look at this statute, and further in-depth exploration of its constitutional defects.

Opinions of other Courts have recognized the unreal choice confronting the defendant with a prior criminal record. On the failure of such a defendant to take the stand, consider this language of Chief Justice Weintraub of the New Jersey Supreme Court in *State* v. *Garvin*, *supra* (44 N. J. at 279):

> "When the State's case points an accusing finger directly at a defendant, common sense demands that he testify if in the truth he is able to fend off the evidence against him. Neither the absence of comment nor an instruction against an adverse inference can dilute the inculpatory force of uncontradicted evidence of that character . . ."

Should the defendant take the stand to testify in his own behalf, he then must cope with the hazards so vividly highlighted in *State* v. *Hawthorne*, 49 N. J. 130, 148, 228 A. 2d 682 (Sup. Ct. 1967):

> "The danger is most apparent when dealing with evidence of independent past criminality, for such evidence may well overwhelm the controverted of present guilt or innocence and the court's limiting instructions may well be viewed with skepticism."

The right to impeach a criminal defendant for previous convictions of a crime has been the target of constant attack. See, *e.g., McCormick, Evidence* (1954), §46, pp. 93-94. See, also, *Ladd, Witnesses,* 10 Rutgers L. Rev. 523, 532 (1955).

A fresh examination of N.J.S. 2A:81-12 is mandated by *Griffin* v. *California,* 380 U. S. 609 (1965). *Griffin* holds that the Fifth Amendment, as incorporated into the due process clause of the *Fourteenth Amendment,* forbids comment upon the failure of the defendant to take the stand and testify in his own behalf. Comment by the prosecutor is said to cut down on the self-incrimination privilege by making its assertion costly, thereby magnifying the inference drawn by the comment into a penalty for asserting a constitutional privilege. 380 U. S. at 614.

If, then, a defendant is afforded constitutional protection because he fails to testify in his own behalf, due process should also require that a defendant not be prevented or discouraged from taking the stand and testifying. Implicit also in the constitutional right of a fair and impartial trial is the right to elect to testify at one's own case, where one's own life or liberty may be at stake.

What this statute, N.J.S. 2A:81-12, does, is to place a "chilling effect" upon the constitutional right of a defendant to testify at his own trial. *United States* v. *Jackson,* 390 U. S. 570, 581-582 (1968); *Dombrowski* v. *Pfister,* 380 U. S. 479, 487 (1965). The present statutory scheme of impeachment for prior convictions of crimes damns the defendant if he testifies and damns him in the eyes of the jury if he elects not to take the stand. Due process requirements of a fair trial require no defendant in a criminal case to make such an unreasonable election.

It can no longer be denied that there is close intertwining of the concepts of due process and that of a fair and impartial trial. *Baker* v. *Hudsputh,* 129 F. 2d 779, 781 (10th Cir. 1941), *cert. denied,* 317 U. S. 681 (1942). A trial procedure is deemed to be "inherently lacking in due process" if it "involves such a probability that prejudice will result . . ." *Estes* v. *Texas,* 381 U. S. 532, 542-543 (1965). And due process also requires that the accused receive an impartial jury trial free from outside influences. *Sheppard* v. *Maxwell,* 384 U. S. 333, 362 (1966). This should, of course, mean free from external influences such as collateral attacks upon the defendant's "credibility" by the prejudicial introduction of his prior criminal record when he takes the stand to speak on his own behalf.

Chief Justice Warren pinpoints the defendant's dilemma most aply in his dissent in *Spencer* v. *Texas,* 385 U. S. 554, 575 (1967):

> "A jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a 'bad man,' without regard to his guilt of the crime currently charged. Of course it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against him. As Mr. Justice Jackson put it in a famous phrase, '[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.' *Krulewitch* v. *United States,* 336 U. S. 440, 453 (concurring opinion) (1949)."

The principal problem of protecting a defendant witness from prejudicial cross-examination on prior record

convictions is analogous to the mass media cases such as *Sheppard* and *Estes, supra.* The procedures employed in both situations are prejudicial to the defendant's right of trial by impartial jury. Barring the introduction of prior record convictions into evidence effectively implements this Court's holding that the method of eradicating prejudicial procedures and in assuring a fair trial lies in the utilization of remedial measures that will prevent prejudice "at its inception." *Sheppard* v. *Maxwell, supra,* 384 U. S. at 363. (Emphasis added.)

The use of prior conviction evidence violates yet another of a defendant's constitutional rights: the equal protection clause of the Fourteenth Amendment which prohibits invidious discrimination. If there is no reasonable basis or classification for the discrimination built into a statute, that law will be held unconstitutioal. *Griffin* v. *Illinois, supra,* 351 U. S. at 17.

Any law which allows a defendant witness to be cross-examined regarding any and all prior convictions is an unreasonable classification and should be considered invidious discrimination because of the lack of a reasonable relationship between all crimes in general, and the tendency of a person to testify truthfully.

An issue similar to the one raised in this case was recently below before this Court in *Cardinale* v. *Louisiana,* 394 U. S. 437 (1969). There, an attack was made upon a Louisiana statute for permitting the confession of a defendant to be read in its entirety, including all of its irrelevant and prejudicial components. Included in the confession were admissions of prior convictions of crime. This Court dismissed the case after oral argument for want of jurisdiction, since the federal question had never been raised below in the Louisiana state courts. This

case is ripe for adjudication. It presents an important problem which has already apparently concerned this Court. For this reason, certiorari should certainly be granted.

That this was a hotly-disputed case is certainly borne out by the following evidence at the trial:

Two eyewitnesses, Tessler (D141a-22 to D142a-15) and Souvay (Sterns) (D441a-12 to 22), placed defendant at the scene of the crime.

Two other eyewitnesses, Somerville (D586a-9 to 15) and Dr. Hirschhorn (D373a-21) were unable to make any in-court identification.

Shortly after the robbery, Sterns identified from a photograph, one Joseph Pontoriero—not defendant—as the man who had allegedly fired a gun at him in the course of the chase from Tessler's jewelry store (D603a-15 to D604a-5).

There was testimony at the trial that three days after the robbery, Tessler failed to identify Wademan while the defendant was seated in the courtroom of the Newark Municipal Court (D1208a-9 to 13).

Both the State and the defense presented conflicting expert testimony about the palm print found in Tessler's jewelry store (D924a-1 to D1008a-16; D1109a-19 to D1202a-6; D1242a-12 to D1256a-17).

Two defense witnesses, Silverman (D1100a-3 to D1109a-17) and Serito (D1216a-17 to D1237a-4), testified that Wademan was in another part of the State when the incidents occurred in Denville.

With such conflicting proofs, the jury undoubtedly would have been anxious to hear from the defendant himself concerning his whereabouts and activities on the day of the crimes alleged in the indictment. His failure to testify doubtless sealed his doom—as would his having testified and exposed his prior criminal record.

Such an ugly choice of alternatives certainly merits examination by this Court. Unquestionably, the very existence of N.J.S. 2A:81-12 raises serious constitutional questions which should, and must, be resolved only by the highest Court of this country. The necessity for review of this terrible procedure authorized by New Jersey law—and by so many other jurisdictions—should be measured by this Court's proclamation in *Tumey* v. *Ohio*, 273 U. S. 510, 532 (1926):

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant or which might lead him not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law."

CONCLUSION

Wherefore, for the reasons above stated, it is respectfully submitted that this petition should be granted.

RAYMOND A. BROWN,
Of Counsel for Petitioner.

ARNOLD M. STEIN,
Attorney for Petitioner.

APPENDIX A

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

(Filed—December 4, 1969.)

Argued November 10, 1969; Supplemental briefs filed November 20, 1969. Decided December 4, 1969.

Before Judges Conford, Collester and Kolovsky.

On appeal from the Morris County Court.

Mr. Raymond Brown argued the cause for appellant (Messrs. Stein & Einhorn, attorneys; Mr. Arnold M. Stein, of counsel).

Mr. James M. Kenihan argued the cause for respondent (Mr. Charles M. Egan, Jr., Morris County Prosecutor, attorney).

PER CURIAM

Defendant and one William Mack were brought to trial on five counts of a six-count indictment charging them with robbery of 16 diamond rings from Albert Tessler (N.J.S.A. 2A:141-1), unlawful entry with intent to rob (N.J.S.A. 2A:94-1), assault with a dangerous weapon upon James Sterns Souvay (N.J.S.A. 2A:90-3), assault with a dangerous weapon upon one Max Hirschhorn (N.J.S.A. 2A:90-3) and larceny of Max Hirschhorn's automobile (N.J.S.A. 2A:119-2).

At the close of the State's case, the trial court granted Mack's motion for a judgment of acquittal. The jury found defendant Wademan guilty on all five counts.

Appendix A

Defendant appeals from the resulting judgments of conviction, arguing four points for reversal. We find no basis for reversal in any of them.

The trial court's findings and its rulings that the out-of-court identifications were made under circumstances precluding unfairness or unreliability, and that the in-court identifications were not tainted by any improper out-of-court identification procedures are fully supported by the record. There is no merit in the several criticisms leveled by defendant at those procedures.

Defendant next argues that the trial court erred in refusing to grant a mistrial following the striking of the testimony of Charles V. Groenthal, a fingerprint expert who testified for the State.

Groenthal was then and had been for more than 20 years an employee of the Federal Bureau of Investigation in Washington, D. C. His duties involved examination and analysis of latent fingerprints and palm prints for comparison with prints of suspects. His qualifications are impressive. He testified that a latent palm print found on a counter top in the Tessler jewelry store had been made by defendant Wademan, describing and indicating in detail 51 points or characteristics which were common to the latent print and an inked print of defendant's palm. In fact, he said, "there are at least 150 points of identity which can be found in both impressions. However, only 51 of these are marked and numbered [on the enlarged chart which he was exhibiting to the jury] * * *, so that the lines from the other points would not crisscross each other and be very difficult to follow."

Nevertheless the trial court, on defendant's motion, struck all of Groenthal's opinion testimony, saying

> "there was no testimony in the case that indicated the significance of those points or indicated the basic reasons behind the opinion that he gave. In other words, there was no testimony that indicated why the matters that he testified to were significant and would support the opinion that he gave as to identification."

Apparently the court was of the view that it was essential that Groenthal "establish a standard" by specifying a minimum number as the number of common characteristics which had to exist in the latent and inked prints before expressing an opinion that they had been made by the same palm, and he had not done so. Instead Groenthal had testified that there was no minimum number required, that the more common characteristics there were, the more probable it was that the two prints were made by the same palm.

Defendant then moved for a mistrial, arguing to the trial court, as he does on appeal to us, that no cautionary instruction which the court might give the jury could effectively cause them to disregard Groenthal's testimony. The trial court denied the motion and gave the jury strong and explicit instructions with respect to the stricken testimony.

Even if the striking of Groenthal's testimony was justified, the court did not abuse its discretion in denying the mistrial and instead giving a curative instruction. *Cf. State* v. *McKinley,* 98 N. J. Super. 280 (App. Div. 1967), aff'd 51 N. J. 25 (1968).

More important, and dispositive of any possible basis for defendant's claim that he was prejudiced by the court's denial of the mistrial, is the fact that Groenthal's testimony should not have been stricken.

Groenthal's qualifications as a fingerprint expert were established. That being so, it was proper for him to compare the palm prints, point out the similarities between them and state his opinion that they were made by the same person's palm. 1 *Underhill, Criminal Evidence* (5th ed. 1956), § 141, p. 268. It was not necessary for him to state that a particular minimum number of points of similarity had to exist before it could be determined that the palm print of defendant was the same as the palm print found on the counter. It sufficed that he stated the obvious fact that the more points of similarity there are, the more probable it is that both prints were made by the same hand. This is the very basis for judicial recognition of the scientific validity of the art of fingerprint and palm print identification, see *Lamble* v. *State*, 96 N. J. L. 231, 236 (E. & A. 1921); *State* v. *Cerciello*, 86 N. J. L. 309, 313-14 (E. & A. 1914), of which the court said in *State* v. *Dantonio*, 18 N. J. 570, 576 (1955):

> "Today no one questions the general accuracy and effectiveness of the art, and expert proof has long been replaced by judicial notice."

It is of interest to note that a State police expert later called by the prosecution "positively" identified Wademan's palm print as the one left in Tessler's store. He found a total of 76 identical characteristics in the two prints. He stated that a positive identification could be made with as few as 12 identical characteristics. A fingerprint expert also testified for defendant. While it was

his opinion that the latent print had not been made by defendant, he testified that it was "generally acceptable" that 8 to 12 identical characteristics were sufficient for a positive identification.

Finally we find no substance in defendant's criticism of the court's comments on the testimony nor in his argument that N.J.S.A. 2A:81-12 is unconstitutional. Our cases have uniformly held the cited statute constitutional. *State* v. *Brown*, 41 N. J. 590, 592 (1964), *cert.* denied 377 U. S. 981 (1964).

The judgments of conviction are affirmed.

APPENDIX B

Order of the Supreme Court of New Jersey Denying Petition

(Filed—February 10, 1970.)

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 10th day of February, 1970.

JOHN H. GILDEA,
Clerk of the Supreme Court.